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Supreme Court, U.S.
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No. 10-253

In The

Supreme Court of the United States

Kevin C. Umphreyville

Petitioner
Pro Se

v.

Charles W. Gittins

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Kevin C. Umphreyville
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Cary, NC 27513
919.606.3997

Questions for Review

1. Can a Court, in the context of a summary judgment request, award summary judgment in a malpractice action, if the Court ignored the initial burden, and also ignored the evidence contained in the record, submitted by the opposing party, that refuted the claimed absence of evidence supporting essential elements of the case?

2. Does the Transcript of the August 6, 2009 Motions Hearing, and the September 29, 2009 Opinion for case 5:07cv00096, when compared with the evidence on record, demonstrate that the District Court acted on a bias, in favor of the Defendant, an attorney, and against the Pro Se Plaintiff, that resulted in the denial of due process for the Pro Se Plaintiff, as described in the Plaintiffs Appeal to the Fourth Circuit Court?

3. Does the District Courts acceptance and utilization of intentional misrepresentations and false information, provided by the Defendant, as the basis for its faulty conclusions, and the failure of both Counts to address the Constitutional issues, and the genuine issues of material fact presented by the Plaintiff, demonstrate that the Fourth Circuit Court has sanctioned a process that was so far departed from the usual course of judicial proceedings, as to call for an exercise of the Supreme Courts supervisory power, as described in Supreme Court Rule 10(a)?

Parties to the Proceeding

All parties appear in the caption of the case on the cover page.

Corporate Disclosure Statement

There is no publicly held or parent company owning 10% or more of a corporations stock, as a party to this case.

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Appendix B – 5:07cv00096 Final Order and Memorandum Opinion-September 29, 2009 United States District Court for the Western Division of Virginia, Harrisonburg Division.
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Opinions Below

United States District Court for the Western Division of Virginia, Harrisonburg Division- Final Order and Memorandum Opinion 5:07cv00096 September 29, 2009.

United States Court Of Appeals for the Fourth Circuit, No.09-2241(5:07-cv-00096-gec-bwc) Judgment and Unpublished per curiam opinion, February 22, 2010.

United States Court of Appeals for the Fourth Circuit, No.09-2241(5:07-cv-00096-gec-bwc) Order denying petition for rehearing or rehearing en banc.

Jurisdiction is established based on the February 22, 2010 Judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the Final Order of the United States District Court dated September 29, 2009. A timely petition for rehearing or rehearing en banc was denied by the Fourth Circuit Court on March 30, 2010. A copy of the Order denying rehearing appears at Appendix C.

The Jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1)

Statutory Provisions

The statutory provisions that confer the jurisdiction of the Supreme Court are those enumerated in the United States Constitution, most importantly, the 14th Amendment and the 5th Amendment. However the Petitioner invokes all rights, protections, and authorities guaranteed to each individual citizen of the United States by our Constitution.

The Fifth Amendment- Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment- Citizenship Rights. Ratified 7/9/1868.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislation thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or

rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UCMJ – 10 U.S.C. § 815

Statement of the Case

Pursuant to 28 U.S.C.§ 1254(1), and Supreme Court Rules 10(a) and 10(c), Petitioner Kevin C. Umphreyville respectfully submits this petition for a writ of certiorari, based on the important constitutional issues, evidence, and circumstances represented in the Federal District Court case 5:07cv00096, and the Fourth Circuit Courts affirmation. Jurisdiction has been established by the Judgment, Mandate, and Order of the United States Court of Appeals for the Fourth Circuit, included with this petition. The order denying the petition for rehearing and rehearing en banc is dated March 30, 2010.

This petition satisfies the requirements for acceptance by the Supreme Court, as stated in Rules 10(a)and 10(c) on two different levels. First, Rule 10(a) provides the following criteria:

> a United States Court of Appeals has sanctioned a process and decision that was so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of the Supreme Courts supervisory power.

The evidence provided by the Transcript of the August 6, 2009 Motions Hearing, (See"Exhibit AA", submitted with the Petitioners Appeal to The Fourth Circuit Court) and the evidence provided in the

District Courts September 29, 2009 Memorandum Opinion, clearly demonstrates, when compared with the evidence contained in the record, that the District Court was not in compliance with legal standards in regard to the evaluation of a motion for summary judgment, and did not - consider all materials in the light most favorable to the party opposing the motion for summary judgment, as required by law. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), *and Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The District Court went much further by completely ignoring evidence, and by accepting intentional misrepresentations and false information provided by the Defendant, (Respondent) and using that false information as the basis for the faulty inferences and conclusions exhibited in the Transcript of the Motions Hearing, and in the Written Opinion dated September 29, 2009. This evidence is a matter, of record, and it is conclusive. It is the evidence that is important, not references to case law, that is not applicable to the facts and evidence presented in this case. The evidence will show that the District Court was either; completely negligent in its responsibilities in the evaluation and assessment of the evidence and facts, or that the District Courts actions represented a calculated effort to achieve a desired outcome. Some of the most serious issues will be addressed later in this petition.

The failure of the Fourth Circuit Court to address the issues presented in the Petitioners Informal Brief is an unfortunate reflection on our Judicial System, and the affirmation by the unpublished per curiam opinion clearly demonstrates a lack of oversight, and the importance of the Supreme Court's acceptance of this case.

Secondly, Rule 10(c) provides that acceptance by the Supreme Court may be granted if:

> a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided, an important federal question in a way that conflicts with relevant decisions of this Court.

The Fourth Circuit Court of Appeals decision to affirm the improper process and decision of the Federal District Court, that denied due process to the Petitioner, presents an opportunity for the Supreme Court to consider a host of important questions of Federal law that should be settled by this Court. The important Constitutional issues presented to the District Court in case 5:07cv00096, specifically the due process rights of our United States Military Servicemembers, in defense of serious felony charges, filed and prosecuted by the government can be manipulated. This case represents a issue that adversely affects hundreds if not thousands of our Military Servicemembers each year, when for lack of evidence, on serious felony

charges preferred by a military Prosecutor, he later decides to send some or all of the charges to a "administrative, non judicial" proceeding, but with the felony charges still pending, the accused often ends up being denied his Constitutional rights, without his knowledge. As in this case, if the accused is not properly represented, the process can be manipulated by the prosecutor, and the felony charges disposed of only after the prosecutor, has achieved his recalculated, illegitimate goals. No evidence was ever submitted to even suggest that the major charges were disposed of prior to the NJP, as claimed by the Defendant (Respondent), and the District Court. In fact, the Petitioner has never seen the disposition of the three major charges, or the other 4 charges that did not go to NJP. His requests for the official disposition have simply been ignored. None of the requests made by United States Senator Elizabeth Dole produced any information regarding the disposition of those 7 charges, but rather the responses contained inaccurate information and illegitimate excuses, as to why the information requested could not be provided. (See "Exhibit Y" submitted with the Plaintiffs Opposition to the motion for summary judgment.) Senator Richard Burr has requested the information on the Petitioners behalf, and time will tell if the information will ever be released.

The process can be further corrupted by the inaccurate, illegitimate, vindictive reporting of the disposition, as demonstrated by "Exhibit O".

(submitted with Plaintiffs Opposition to the Motion for Summary Judgment) This response letter to Senator Richard Burr demonstrates just how vindictive and illegitimate the entire process was. The Assistant Director for Communications for the Department of the Navy, Mr. Klein, is only reporting from what is in the official record of the 2002 scandal, he does not know that the Petitioner never plead guilty to any charges. The references to the "updated" disposition provides clear evidence that the original disposition was illegitimate, and that the Defendants (Respondents) acts and omissions allowed the Prosecutor to gain control over a corrupted process, in which he had no control, and should have faced disciplinary action, or more serious consequences.

Additionally, the Fourth Circuit Courts decision to affirm the improper process and decision, is in itself an important question of federal law decided by a United States Court of Appeals, that should be decided by this Court. The facts and evidence provided to the Fourth Circuit Court in the Petitioners Appeal, is a matter of record, and demonstrates that the flawed and improper evaluation and assessment of the evidence and facts were not in accordance with the well established legal standards relative to a motion for summary judgment. The Fourth Circuit Courts decision did sanction a process that improperly denied the Pro Se Plaintiff his opportunity to have a jury decide the genuine issues of material fact presented in the

evidence. Also, because the district Court decided to go to such great lengths to completely ignore evidence presented by the plaintiff (See Exhibits A, G, I, O, V, W, X, Y, Z, submitted with the Plaintiffs Opposition to the Motion for Summary Judgment), and to attack and misrepresent facts and information, provided in other important evidence, presented by the Plaintiff, (See Exhibit B, C, E, F, H, S, T, submitted with Plaintiffs Opposition to the Motion for Summary Judgment) the Fourth Circuit Courts affirmation, and denial of a rehearing or rehearing en banc, is not proper. Therefore, the Fourth Circuit Courts decision is impossible to justify based on the facts and evidence contained in the record, and must be reversed.

The Petitioners (Plaintiffs) Complaint was filed in the Federal District Court against the Respondent (Defendant) on September 10, 2007, for his negligent acts and omissions committed in 2002, while supposedly representing his client's best interests in regard to Military related issues. The Constitutional basis for the five (5) counts asserted, was thoroughly presented in the Complaint, and satisfied the Jurisdictional requirements for filing in Federal Court. Diversity was also included as a basis for jurisdiction.

The district Court's decision to grant summary judgment, demonstrating a total disregard for the evidence contained in the record, was improper. The Fourth Circuit Court of Appeals failure to address the issues and evidence presented by the Petitioner

requires an exercise of the Supreme Courts supervisory power.

Because of the unusual nature of the 2002 scandal, and the Federal Courts failure to consider evidence, and to clearly misrepresent other evidence, presented in regard to case 5:07cv00096, the Petitioner can best present additional specifics with the argument, or reasons for granting the writ, section of this of this Document. At this point, the case against the "opposing party" or Respondent has been proven. The evidence is contained in the record. It is conclusive. It is now the actions of Federal Government representatives that requires the Supreme Courts attention, and because of that unusual circumstance, the Petitioner can best present these issues in the argument section, explaining the eight (8) year refusal of the government to correct an obvious injustice.

Reasons for Granting the Writ

The 2002 scandal that is described in the complaint, pleadings, and evidence contained in the record of Federal District Court case 5:07cv00096, can best be described as "incredible, for all the wrong reasons." The "investigation" of an accusation of rape, was flawed from the very first moments of the governments contact with the accuser. The Petitioner was improperly arrested immediately, even though the accuser was not injured in any way, and she had made conflicting and contradictory

statements to at least 5 different people prior to speaking with the government's investigator. Also included in her statements was, an admission to the hospital personnel, conducting the rape examination, that she had suffered from emotional issues for at least the previous year. The 3 written accounts of the alleged rape taken by hospital personnel are all different from each other, and her "official sworn statement" prepared by the investigator, was signed 2 days after the arrest of the Petitioner, and presented a fourth version of the alleged rape.

A Military Defense Counsel (MCDC) was assigned to defend the Petitioner, and she told him the first time they met that she had just recently became an attorney, and that he needed to hire a civilian attorney because, she did not have the experience to handle a case like his. Each time the Petitioner met with the MCDC, she would tell him about statements that the Prosecutor had made regarding the strength of his case against the Petitioner. Approximately 3 weeks into the investigation, she informed the Petitioner that the Prosecutor had a second rape allegation against him. The Petitioner again stated his innocence and told her that he had never even had sex with the 2nd woman, and that he had faith in the system, and that no charges would be filed, because there was no truth to the allegations. Also, she told the Petitioner that the Prosecutor had a video that he claimed would help convict the Petitioner of the first rape allegation.

The meetings with the MCDC became increasingly more troubling, and she told the Petitioner that the Prosecutor had told her (words to the effect)-that before this is over, that kid is going to admit to raping these 2 women. On or about May 1, 2002, the MCDC again told the Petitioner that it was imperative that he hire a civilian attorney because the Prosecution had just told her that changes were imminent, and that he would be facing two(2) life sentences, plus additional charges.

On May 7, 2002 the Petitioner hired the Respondent, only after the Petitioner and his family became very concerned with the uncontrolled actions of the Prosecutor and the MCDC. The terms of representation, and the attorney-client relationship were established on May 7, 2002 between the Petitioner and the Respondent, during a telephone conversation, and when the Petitioner transferred a $5000.00 retainer fee into the Respondents bank account (See Exhibit A"- submitted with Plaintiffs Opposition to the Motion for Summary),

The Petitioner asked the Respondent to attempt to head-off any charges, because he was completely innocent, and to let the Prosecutor know that he would hold him responsible if he filed charges that he could not substantiate. Three (3) days later the Prosecutor filed scandalous felony charges against the Petitioner. So, two months of "investigation" and no charges were filed, however 3 days after the Petitioner hired the Respondent, eleven (11)scandalous charges were filed including two(2)

rape charges, a conspiracy charge, and 8 fabricated additional charges.

The acts and omissions of the Defendant (Respondent) are well explained in the Petitioners (Plaintiffs) complaint, pleadings, evidence, Opposition to the Motion for Summary Judgment, and Appeals to the Fourth Circuit Court. The Defendant in case 5:07cv00096, Charles W. Gittins has provided no evidence, not a single document that disproves any of the allegations presented in the Plaintiffs Complaint or other submissions to the Court. Also, Mr. Gittins has not provided any evidence that demonstrates that he did anything to represent the best interest of his client. In fact the evidence in the record will show that Mr. Gittins did just the opposite, his acts and omissions, betrayed his client's best interests and violated the ethical and legal standards of the duty owed his client. The evidence will show that he did just that on several different occasions. There are no complicated issues involving standard of care questions, as the Defendant (Respondent) and District Court have attempted to suggest. It is simply wrong for an attorney to lie to his client, and to leave his client to be manipulated by the Prosecution. Mr. Gittins acts and omissions define legal malpractice.

The Defendant (Respondent) was specifically hired to head-off any possible charges that might be filed against his client in regard to false allegations, and to defend his client on any and all charges that might develop, through to the disposition of any and

all charges. Three days after the Defendant was hired, a Military prosecutor, with the full authority and resources of the United States Government, and the protection provided by the Feres Doctrine, filed eleven (11) scandalous charges against his 22 year old client. The Defendant did nothing to represent the best interest of his client, as demonstrated by the evidence, and by the two most basic facts of the case that are completely undisputed, and should have resolved these issues years ago. First, the prosecutor could not produce a single witness or any evidence, to substantiate, or even support, any of the 11 charges. Secondly the Petitioner was denied due process, in that he was denied all of his rights as stated in the *Manual for Courts- Martial* (2002 ed.) Part V (4) (C) (1) (A)-(G), and the *UCMJ* – 10 U.S.C. § 815.

The Petitioner was denied all of these rights. Most importantly, (B) allows for a spokesperson (attorney, or other representative) but the Petitioner had been told by his attorneys that they could not attend, and that he had to attend by himself. (F) allows for defense witnesses, and all requested defense witnesses were denied. (G) allows for the proceeding to be open to the public, however it was not. (See Exhibit I-Procedure for Non Judicial Punishment, See also Complaint line #71 – Line #92, See also Exhibit S – Navy documents- Acceptance of NJP- page- Navy 00034, See also Exhibit H- Affidavit of Richard Van Bortel) The evidence supporting the Petitioners allegations and complaint is powerful,

and the Respondent and the Courts have ignored it, or attempted to misrepresent it.
The evidence presented against the Defendant is overwhelming. There are well over one thousand (1000) pages in evidence on case 5:07cv00096, and not one page of it can disprove any of the statements or allegations presented by the Petitioner. On the other hand, there are a number of documents that prove the Defendant lied to his client, and withheld information from his client. Perhaps more importantly is the evidence that demonstrates that the Defendant intentionally lied in his submissions to a Federal Court, which should have had serious consequences, but did not. Instead the Court used the false information as the basis for its flawed conclusions and decision.

For the purpose of this brief, the main focus is the attempts by the District Court to ignore and to discredit evidence, which is a violation of well established standards, and will be discussed later in this brief. In order to establish the Courts improper process and evaluation of the evidence, this Court need only briefly review the 26 exhibits that were presented by the Plaintiff in his Opposition to the Motion for Summary Judgment. However, the pleadings and submissions to the Court of Appeals may be a useful source of additional information and insight.

The following list of evidence was submitted with the Plaintiffs Opposition to the Motion for Summary Judgment.

Exhibits

A. Bank Transfer
B. Defendants Proposed Fee Agreement-Retainer
C. Defendants July 16th telefax letter
D. Defendants Written Matters- Memorandum June 14, 2002
E. Article 32 Recommendation
F. Affidavit of Robert Nunley
G. Deposition of Charles Gittins
H. Affidavit of Richard Van Bortel
I. Procedure For Non-Judicial Punishment
J. Affidavit of Kevin Umphreyville December 15, 2008
K. Kevin Umphreyvilles letter to Senator Dole November 1, 2008
L. Allied Barton Contract
M. Rejection letter-Durham Police Department
N. Aerotek Employment Offer
O. Response letter to Senator Burr
P. Affidavit of Eric Umphreyville
Q. Eugene Fidell Report
R. Unit Punishment Book
S. Navy Documents-Acceptance of NJP(Navy 00032-34,00062-63)
T. "Office Hours Guide"(Navy 00067-00070,00035-00037,00057-59)
U. Affidavit of Robert Hagerman
V. Affidavit of Raymond Bell Jr.
W. Affidavit of Tyler Call
X. Affidavit of James Flint
Y. Response letter to Senator Dole July 31, 2003 Inquiry
Z. Defense File

Quick Reference- Supporting Evidence

The following reference is not intended to represent a complete listing of all relevant documents. Please see all additional documents submitted with this reference. Also, the Plaintiff respectfully requests to reserve the right to provide additional information and documentation at the hearing.

Duty Owed- Supporting Evidence

Please see – Exhibit A - Bank Transfer, Exhibit B- Defendants Proposed Fee and Retainer Agreement, Exhibit C- Defendants July 16, 2002 telefax letter, Exhibit D- Defendants "Written Matters" Memorandum – June 14, 2002 – Exhibit E – Article 32 Recommendation, Exhibit F – Affidavit of Robert Nunley, Exhibit G – Deposition of Charles Gittins – Page 29, Line 6 – Page 36 line 15.

Breach of Duty – Supporting Evidence

Please see – Supporting Evidence Exhibit C – Defendants July 16, 2002 telefax letter, Exnibit D – Defendants "written matters" Memorandum – June 14, 2002, Exhibit D-Article 32 Recommendations Exhibit F, - Affidavit of Robert Nunley, Exhibit G – Deposition of Charles Gittins Page 105 line 5 – Line 11, Page 224 line 12 – Page 225 line 11, Exhibit H – Affidavit of Richard Van Bortel, Exhibit I – Procedure for Non-Judicial Punishment.

Damages – Supporting Evidence

Please see – Exhibit J – Affidavit of Kevin Umphreyville, Exhibit K – Kevin Umphreyville letter to Senator Dole, Exhibit L – Allied Barton Contract Exhibit M – Rejection letter – Durham PD, Exhibit N – Aerotek offer, Exhibit O – Response Letter to Senator Burr, Exhibit P – Affidavit of Eric Umphreyville

Proximate Cause – Supporting Evidence
Please see – Exhibit C – Defendant July 16, 2002 telefax letter, Exhibit D – Defendants "Written Matters" Memorandum – June 14, 2002, Exhibit E – Article 32 Recommendation, Exhibit F – Affidavit of Robert Nunley, Exhibit G – Deposition of Charles Gittin, Page 105, line 5 – line 11, Exhibit H – Affidavit of Richard Van Bortel, Exhibit I – Procedure for Non-Judicial Punishment, Exhibit R – Unit Punishment Book, Exhibit S – Navy Documents – Acceptance of NJP, Exhibit T – "Office Hours (NJP) Guide", Exhibit U – Affidavit of Robert Hagerman, Exhibit V Affidavit of Raymond Bell Jr, Exhibit W Affidavit of Tyler Call, Exhibit X Affidavit of James Flint, Exhibit Y – Response letter to Senator Dole, July 31, 2003 Inquiry, Exhibit Z – Defense Files

This evidence presented with the Plaintiffs Opposition to the Motion for Summary Judgment represents only a small portion of the evidence against the Defendant, (Respondent) because much less evidence is required to defeat a motion for summary judgment, than is needed to prove your case at trial. However, there is one (1) additional document that was entered into evidence prior to the Plaintiffs Opposition to the Motion for Summary Judgment that will be of interest to this Court. The letter from Mary Fran Gallagher, in references to the outcome of the 2002 prosecution, she clearly attempts to minimize her responsibility for the scandalous disposition, by stating that she was not the "lead" attorney in the case, which of course places that responsibility on Mr. Gittins, the Respondent. The Petitioner wanted to save this letter for trial, just in case Gallagher might appear, an almost inconceivable possibility; however the Petitioner wanted the opportunity to question her, particularly on the evidence presented in "Exhibit Z"- the Defense file.

Evidence-Motions Hearing August 6, 2009

The Transcript of the August 6, 2009 Motions Hearing reveals facts that should not have been overlooked by the Fourth Circuit Court of Appeals. (See Exhibit "AA"- submitted with Petitioners Appeal to the Fourth Circuit Court. The Transcript

is extremely important because it provides hard evidence of the Courts, one sided and improper evaluation and assessment of the evidence, the Courts failure to review the evidence submitted by the Plaintiff, the Courts failure to attempt to reconcile or even address the genuine issues of material fact presented by the Plaintiff, the Courts failure to ask the Defense any questions in regard to obvious genuine issues of material fact, the Courts failure to address the moving party's burden in regard to a summary motion request, the Courts attempts to discredit the Plaintiffs evidence and witnesses, and the Courts attempt to intimidate the Plaintiff and convince him that his evidence was not sufficient to withstand the Motion for Summary Judgment.

The Transcript unfortunately demonstrates a corrupted version of what should have been a legitimate and fair attempt to establish the true facts of the case. Instead the Court allowed the Defense to misrepresent the issues and facts,(See Exhibit AA pages 1-17) and never asked the Defense a single question regarding the disputed facts. When the Plaintiff attempted to present his evidence, the Court interrupted him, (See Page 18 line 3- Page 20- line 3) and attacked virtually every statement the Plaintiff made with fictional or non-relevant information that is completely refuted by the evidence presented by the Plaintiff.

The Court made some incredible statements and admissions during the hearing, that completely demonstrate that at least to this point in the process, the Court was not in command of the facts. The Court admitted to not knowing that the Plaintiff had taken a deposition of the Defendant (See Page 26 line1 - Page 28 line 20).

The Court said: " Have you disposed Mr. Gittins? I don't know"

It is not acceptable for a Federal District Court to take a position supporting one party over the other, when the Court is not even familiar with the evidence. The Plaintiff submitted the deposition in its entirety, and made references to it many times in the Plaintiffs Opposition to the Motion for Summary Judgment. So, apparently the Court never read the Plaintiffs Opposition either. It appears that the Court was well versed on the Defendants fictional version of events, but was not at all familiar witrh the evidence on record.

The Petitioner would respectfully request that this Court read the entire Transcript, as it clearly demonstrates that as of August 6, 2009 the Court was not in command of the facts, and had not even looked at much of the evidence, and that it was incumbent on the Court to consider the issues and evidence contained in the record prior to making any decisions on this case.

September 29, 2009 Opinion- Evidence Against the Court

The Final Order and Memorandum Opinion filed on September 29, 2009, for case 5:07cv00096, fall far short of a legitimate evaluation, and assessment of the evidence based on the requirements of Rule 56 of the Federal Rules of Civil Procedure. The written Opinion if not only factually incorrect on virtually every significant issue stated, but more importantly, the Opinion demonstrates not only a calculated attempt to discredit and misrepresent statements, evidence, and facts, but also the Opinion is defective as a result of the omissions, and failure of the Court to address evidence and issues presented by the Plaintiff.

It is difficult to believe that this 20 page Opinion was actually written by anyone associated with Federal District Court, not only because it is so obviously defective in content, but also because it is so one-sided in its approach, that any reasonable review of the evidence would find fault with every issue addressed. The Opinion is written in a way that would be more consistent with an opinion by the fact finder after a non-jury trial. The Opinion attempts to indicate that the Petitioner was guilty or would have been found guilty at Court Martial, rather than addressing the issues relevant to the Motion for Summary Judgment, such as the burden of the moving party. It seems likely that this entire

Opinion may have been written by the Defense, at least in draft form, until the copy "seemed reasonable" enough for release. However, the written Opinion is no way a properly reasoned report; rather the Opinion clearly demonstrates a contempt for the evidence.

The District Courts improper and corrupted discussion of the issues directly related to the Motion for Summary Judgment begin with an intentional misrepresentation in the first sentence of the Written Opinion, which designated the legal action against the Respondent, as a diversity action. The Court completely ignored the Constitutional basis of the complaint. (See Complaint #3, #73, #76, #77, #78, #79, #81, #82, #83, #84, #86, #87, #88, #89, #91, #92, #98, #99) Every pleading the Petitioner has submitted to the Courts, clearly describes the Constitutional issues involved, and the Courts reasons for ignoring these issues are obvious. The Court ignored the issues because the Defense ignored the issues, because the evidence supporting the allegations is irrefutable. The undisputed, unchallenged, fact that due process was denied, means that someone is responsible for that injustice, and it could only be Charles W. Gittins or Mary Fran Gallagher, or both. Gittins was hired specifically for that reason, and Gallagher's letter of December 29, 2003, puts that responsibility directly on Gittins.

The failure of the Respondent, (Defendant) to address the Constitutional basis and issues presented in the complaint, pleadings, and evidence constitute a failure to meet its initial burden in a request for summary judgment. The movant has the burden of showing that there is no genuine issue of fact. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Plaintiff presented many genuine issues of material fact in the evidence submitted in response to the Motion for Summary Judgment. (See Plaintiffs Opposition to the Motion for Summary Judgment). The Defendants failure to address the Constitutional issues and other factual issues presented was in direct violation of the requirements of FRCP 56. See *Celotex Corp v. Catrett*, 477 U.S. 317 (1986) See also *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970) In both of these cases the Defendant moved for summary judgment based on a claim that the record contained no evidence to support an essential element of the Plaintiffs claim. The Defendants were not free to ignore the Plaintiffs supporting evidence, and just as in the Petitioners case, the Plaintiffs responded by drawing the Courts attention to evidence that was already in the record, and that had been ignored by the moving party. As in case 5:07cv00096 summary judgment was improper, based on the failure of the moving party to address evidence contained in the record, the moving party had failed to satisfy its initial burden of production under Rule 56.

The District Court had an obligation to enforce the requirements of FRCD Rule 56, and its failure to do so was a violation of ethical and judicial standards. The Fourth Circuit Courts affirmation has indeed sanctioned a process and decision that was so far departed from the accepted and usual course of judicial proceedings as to require an exercise of the Supreme Courts supervisory power.

Additionally, the District Court went much further in demonstrating its lack of concern in adhering to ethical and judicial standards by misrepresenting evidence contained in the record, and by completely ignoring evidence that refuted claims "suggested" in the Written Opinion. There are at least five major categories of additional violations of ethical and judicial standards that are represented in the Written Opinion. They are as follows:

1. The misrepresentation of the attorney-client relationship.

2. The attempts to discredit witness affidavits

3. The failure to address the significance of the Constitutional issues and denial of due process.

4. The failure to address evidence that impeached the moving party's claim.

5. The failure to address the genuine issues of material fact presented by the non-moving party.

The evidence contained in the record, when compared to the Written Opinion, completely supports the five (5) categories of violations referenced above, and it should not be necessary to provide explanations, as a quick review of the evidence clearly demonstrates the District Courts improper actions. However the Petitioner will briefly point out a few of the most egregious misrepresentations. On page 20 of the District Courts Opinion,(included) the Court states "In the instant, as previously stated, it is undisputed that an attorney-client relationship was established in May of 2002, when Umphreyville's father retained Gittins to represent Umphreyville" This statement is an blatant attempt to misrepresent the facts, and the attorney-client relationship. (See "Exhibit A"- Bank Transfer, submitted with Opp.) "Exhibit A" is the Bank Transfer from the Petitioners bank account at Parris Island to the Bank account of the Respondent. The Petitioners father did <u>not</u> retain the services of the Respondent, the Petitioner did. The Attorney-client relationship was established on May 7, 2002 during the telephone conversation between the Petitioner and the Respondent, and the scope of representation was agreed to as the Petitioner has stated many times. The representation was to begin immediately, as soon as the retainer fee was transferred into the Respondents account. The Petitioner asked the Respondent to attempt to head-off any charges, because he was completely innocent, and he knew that any evidence would prove that. If

charges were filed against the Petitioner, the representation would continue through to the disposition of any and all charges that could follow, if the Respondent was not successful in preventing the Prosecutor from proceeding with charges. The Respondent lied about the retainer and the scope of his representation, and avoided the issue regarding the establishment of the attorney-client relationship. (See Defendants Answer line #19, See also, Complaint-line #19) The District Court never attempted to question the Respondent about this genuine issue of material fact; rather, the Court went on to misrepresent the relationship on the Respondents behalf. Although there was no written contract between the Petitioner and the Respondent, there is nothing in the proposed fee agreement that conflicts with the Petitioners explanation of it.

On page 21 of the Opinion, the Court stated "Instead, the most serious charges were dismissed following the Article 32 hearing at which Umphreyville was represented by Gittins" "Exhibit C" disproves this misrepresentation. (See "Exhibit C"- Defendants July 16th telefax letter) This letter disproves <u>many</u> intentional misrepresentations made by the respondent. Perhaps the most important evidence provided by this letter is the fact that it exposes Gittins claim that his representation had ended at the Article 32 Hearing in June. The letter, dated July 16, 2002 leaves no doubt as to who the attorney of record was. He never even mentions

Gallagher. The District Courts explanation of this, again demonstrates a calculated effort to misrepresent the facts and evidence, in favor of the Defendant, an attorney. (See page 6 of the District Court Opinion; see also- Complaint-line #53-line #69)

The District Courts attempts to discredit and ignore witness affidavits are inconceivable. The Petitioner submitted eight (8) affidavits of the ten witnesses scheduled to appear at trial. The Defendant and the Court completely ignored 6 of these affidavits, again a failure to satisfy its initial burden. The Court attempted to discredit the significance of Expert Witness Robert Nunleys Affidavit. Mr. Nunley, a retired Marine Corp Judge provided a powerful affidavit supporting the Petitioners claim. The Court intentionally misrepresented the statements of Mr. Nunley. On page 23 of the Opinion the Court states "Nunley stated in conclusory fashion, that Gittins "owed a continuing obligation" to Umphreyville during the course of the NJP proceeding, and continued by adding "Given the absence of any factual basis for Nunley's statement, the Court is convinced that Nunley's affidavit fails to create a genuine issue of material fact." – This statement is simply <u>not true</u>. Our Federal Court system has a responsibility to uphold and enforce the laws of our Country, and an obligation to defend our Constitution. The arrogant, condescending statements presented in this Opinion demonstrate a lack of respect for the integrity of our

judicial system. Mr. Nunley provided six (6) facts on which he based that particular statement. The Court also attempted to misrepresent the statements provided by Mr. Van Bortel, another retired career Marine. Mr. Van Bortel did not know the Petitioner prior to administrating the documents provided in "Exhibit S" to the Petitioner. His signature appears on the documents numbered- Navy 00032, 00033, 00034, 00062, and 00063. Again the Court has misrepresented the evidence, stating- "However Van Bortel did not set forth any factual basis or reasoning for this lay opinion, and the affidavit provides no indication that Van Bortel is competent to testify on the matter stated". This statement is simply not true. First, Mr. Van Bortel is the 1st Sgt refered to in the Complaint, (See Complaint line #91-#92) and his opinion is not a "lay opinion" as it was his responsibility to prepare Marines for NJP, and attend the proceeding. He has attended many NJP Hearings in his career, but none like this one. Also, Mr. Van Bortel was a fact witness, not an expert witness and his testimony establishes a host of critical facts, not the least of which is his verification that no witnesses were present, and to several other due process issues.

The six affidavits that the Court ignored completely were provided by individuals who have significant knowledge of the facts involved in the 2002 scandal. Again, the Defendant's failure to address the statements and facts presented in these

affidavits represents a failure to satisfy the requirements of the initial burden.

On page 24 of the Opinion (included copy) the Court begins a four (4) page attempt to suggest that the Petitioner has not provided sufficient evidence to support the causation element in this malpractice claim. There can be no question, that this statement demonstrates not only that the Court acted on its bias, but also demonstrates the arrogance to believe that these statements will never face any possible oversight proceedings.

The United States Constitution provides the foundation for our judicial system, and our Federal Courts have an obligation to uphold the statutory provisions, and laws that protect each individual citizen of our country. The 14th Amendment and the 5th Amendment specifically provide rights and protections guaranteed to each citizen, as an individual. The actions of the Federal District Court are in direct violation of these rights, and the Constitution of the United States.

The Petitioner provided a tremendous amount of evidence supporting each of the four elements of a malpractice claim, (See Page 17, 18, and 19 of this document, See also "Exhibit G" Deposition of Charles Gittins- Page 105 line 5 – line 11.) the Petitioner has stated in <u>every</u> document submitted to the Courts, that the government could not produce a single witness or any evidence to substantiate any of the

eleven charges. In three (3) attempts, three hearings, the government could not produce any evidence or witness testimony to substantiate any charge. However the evidence clearly shows that the Petitioners military record contains false information comparable to a felony conviction. (See "Exhibit O") The evidence also clearly shows that Charles W. Gittins acts and omissions allowed a Military Prosecutor to gain control over a corrupted process, in which he had no control, and allowed the Prosecutor to manipulate the Process and the Petitioner.

The legal standards relevant to Rule 56 of the Federal Rules of Civil Procedure require the Court to, not only consider the evidence presented by the nonmoving party, but that the evidence is to be believed, and all justifiable inferences are to be drawn in his favor. Also in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 the Court held that: a summary judgment will not lie if the dispute about a material fact is "genuine" that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Also the Court stated that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

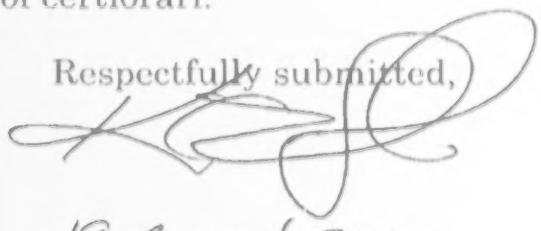
Summary

The District Courts attempts to misrepresent the facts, evidence, pleadings, and affidavits represent a serious violation of ethical and legal standards, and requires the supervisory power of the Supreme Court. The Petitioner completely understands the discretionary decisions involved in the selection of cases by the Supreme Court, however the Petitioner would respectfully point out that the decisions made by the Federal District Court and the Fourth Circuit Court were not discretionary issues. It is not known what external influences were involved in shaping the corrupted processes and decisions, however one thing is for certain, the decisions were not consistent with the facts and evidence contained in the record of case No. 99-2241 (5:07cv00096-gec-bwc).

Conclusion:

Petitioner Kevin C. Umphreyville respectfully requests, that in the interest of justice, this Court grant a writ of certiorari.

Respectfully submitted,



19 August 2010

Kevin C. Umphreyville
103 Chalmette Court
Cary, North Carolina 27513
umphreyvillek@yahoo.com

Index to Appendices

Appendix A – No. 09 – 2241 (5:07-cv-00096 gec-bwc) Judgment and unpublished per curiam Opinion- February 22, 2010- United States Court of Appeals for the Fourth Circuit.

Appendix B – 5:07cv00096 Final Order and Memorandum Opinion-September 29, 2009 United States District Court for the Western Division of Virginia, Harrisonburg Division.

Appendix C – No. 09-2241 (5:07-cv-00096 gec-bwc) Order-denying petition for rehearing and rehearing en banc-March 30, 2010.

Appendix D – No. 09-2241 Stay of Mandate- March 8, 2010.

Appendix E – No. 09-2241 Mandate April 7, 2010.

Appendix A

No. 09-2241 (5:07cv00096)
Judgment and unpublished per curiam Opinion
February 22, 2010 – United States Court of Appeals
for the Fourth Circuit.

FILED: February 22, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2241
(5:07-cv-00096-gec-bwc)

KEVIN C. UMPHREYVILLE,

Plaintiff – Appellant

v.

CHARLES W. GITTINS,

Defendant – Appellee

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2241

KEVIN C. UMPHREYVILLE,

v. Plaintiff - Appellant,

CHARLES W. GITTINS,

Defendant – Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Glen E. Conrad, District Judge. (5:07-cv-00096-gec-bwc)

Submitted: Feb. 10, 2010 Decided: Feb. 22, 2010

Before WILKINSON, KING, AND DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kevin C. Umphreyville, Appellant Pro Se. William Leonard Mitchell, II, ECCLESTON & WOLF, PC, Washington, D.C. for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin C. Umphreyville appeals a district court order granting summary judgment to Charles W. Gittins and dismissing his complaint. We have reviewed the record and the district court's memorandum opinion and affirm for the reasons cited by the district court. See Umphreyville v. Gittins, No. 5:07-cv-00096-gec-bwc (W.D. Va. Sept. 29, 2009). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Appendix B

5:07cv00096 Final Order and Memorandum Opinion- September 29, 2009 United States District Court for the Western Division of Virginia, Harrisonburg Division.

Case 5:07-cv-00096-gec-bwcDocument57 Filed9/29/09

Clerk's Office U.S. Dist. Court
At Roanoke, Va
Filed Sept. 29, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN F. CORCORAN, CLERK
BY: "s/". John_F. Corcoran
DEPUTY CLERK

KEVIN C. UMPHREYVILLE,)
Plaintiff.) Civil Action
v.) No. 5:07CV00096
) **FINAL ORDER**
CHARLES W. GITTINS)By: Hon. Glen Conrad
Defendant) U. S. District Judge

For the reasons stated in the accompanying memorandum opinion, it is now

ORDERED

as follows:

1. The defendant's motion for summary judgment is **GRANTED**;
2. All other pending motions are **DISMISSED AS MOOT**; and
3. This action shall be **STRICKEN** from the active docket of the court.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to the plaintiff and all counsel of record.

ENTER: This 29th day of September, 2009.

United States District Judge

A TRUE COPY, TESTE:
JOHN F. CORCORDAN, CLERK
BY: "s/". John F.Corcoran_ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

KEVIN C. UMPHREYVILLE	)	
Plaintiff	)	Civil Action
v.	)	No. 5:07CV00096
CHARLES W. GITTINS	)	MEMORANDUM
	)	OPINION
Defendant.	)	By: Hon. Glen E. Conrad
	)	United States District Court

The plaintiff, Kevin C, Umphreyville, proceeding pro se, filed this diversity action against the defendant, Charles W. Gittins, asserting claims for breach of contract and legal malpractice. The action stems from the defendant's representation of the plaintiff during the course of military justice proceedings at the Marine Corps Recruit Depot in Parris Island, South Carolina. The matter is presently before the court on Gittins' motion for summary judgment. For the reasons that follow, the court will grant Gittins' motion.

Factual and Procedural Background

Umphreyville previously served as a Lance Corporal in the United States Marine Corps In March of 2002, Umphreyville was stationed at Parris Island, where he had the military occupational specialty designation ("MOS") of military policeman.

On March 9, 2002, Kayleen Anderson, a 17-year-old woman, accused Umphreyville of sexually assaulting her at a residence within the confines of the Marine Corps installation at Parris Island. During the subsequent Naval Criminal Investigation Service ("NCIS") investigation, another female civilian, Melissa Nortum, came forward and accused

Umphreyville of sexually assaulting her in March of 2002.

Based on the information and evidence gathered from the NCIS investigation, Umphreyville was charged with violating four articles of the Uniform Code of Military Justice ("UCMJ"). The first charge was for conspiring to impede an investigation, in violation of Article 81 of the UCMJ,10 U.S.C §881 The second charge involved two specifications of rape, in violation of Article 120, 10 U.S.C. § 920. The third charge was for committing sodomy with Kayleen Anderson, in violation of Article 125, 10 U.S.C. § 925. The fourth charge involved seven specifications of either soliciting indecent acts or using indecent language, in violation of Article 134, 10 U.S.C. § 934. 1

Mary Fran Quindlen (nee Gallagher) was appointed to serve as Umphreyville's military defense counsel. Given the serious nature of some of the charges, Quindlen recommended that Umphreyville retain civilian counsel to assist with his defense. Quilndlen referred Umphreyville to

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1 The court notes that, in the military, allegations of criminal conduct are set out on a charge sheet in the form of charges and specifications. David A. Schlueter, Military Criminal Justice: Practice and Procedure § 6-1(B) (7th Ed. 2008). The charge refers to the applicable punitive article of the UCMJ that the accused allegedly violated, while the specification states the specific facts and circumstances that the prosecution is relying upon to support the charged violation. Id. "Each specification, along with the charge, constitutes a separate accusation," Id.

several attorneys, including the defendant, Charles Gittins, a retired Marine Corps judge advocate who resides in Winchester, Virginia.

Gittins was subsequently retained to represent Umphreyville in May of 2002. The terms and conditions of Gittins' representation were outlined in a May 2, 2002 retainer letter addressed to Umphreyville's father. The retainer letter provided, in pertinent part, as follows:

> The purpose of this letter is to confirm the terms and conditions under which I will undertake the representation of your son, Kevin in connection with the court-martial proceedings now pending preferral at MCRD Parris Island, South Carolina.
> My attorney's fees for representation in this matter will be as follows:
> $5,000 for representation in the Article 32 hearing, payable by cashier's or certified check at the time I am retained to represent you.
>
> $9000 for representation in court-martial proceedings, through submission of post-trial matters to the convening authority in the event of a conviction, payable in full via cashier's or personal check within 2 weeks after the charges are referred to trial. This portion of the fee shall be due only if the charges are referred to trial and shall be considered earned in full in the event I am successful in winning a final dismissal of the charges prior to trial.

In addition to my fees, I will be entitled to payment or reimbursement for costs and expenses incurred in performing services such as photocopying, computerized research, travel (including mileage, parking, lodging, meals), long-distance telephone, and telecopying. Because this case will be tried in Beaufort, South Carolina, I expect that I will be required to make up to three trips to South Carolina, including an overnight trip for the Article 32 hearing, an overnight trip for motions, in the event we have any to litigate prior to trial, and finally, several days for trial, if one is ordered. I will endeavor to keep my expenses to a minimum, consistent with what is necessary to zealously and professionally represent your son in these proceedings.

(Compl. Ex. A). Gittins was subsequently paid $5,000 to represent Umphreyville during the course of the Article 32 proceeding. [2]

After Gittins was retained to represent Umphreyville, Gittins obtained and reviewed the NCIS investigative file. Additionally, Gittins and Quindlen agreed that Quindlen would interview potential witnesses and assist Gittins in preparing for the Article 32 hearing. However, the attorneys agreed that Gittins would have first-chair responsibility at the hearing.

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2 The court notes that the Article 32 investigation is similar to the civilian grand jury, in that "'[b]oth are designed to avoid trials on baseless charges.'" Schlueter, supra n 1 § 7-2. However, unlike civilian grand jury proceedings, the accused and counsel may attend the Article 32 hearing, and testimony,

The Article 32 hearing was conducted by the Investigating Officer on June 11 and 12, 2002. During the hearing, Gittins cross-examined several witnesses called by the government, including Melissa Nortum, one of the alleged rape victims. The other alleged rape victim, Kayleen Anderson, did not appear at the hearing.[3] Gittins did not call any defense witnesses. Instead, Umphreyville tendered an unsworn statement, in which he admitted that he had participated in consensual oral sex with Anderson. Following the Article 32 hearing, Gittins submitted a memorandum to the Investigating Officer, in which Gittins advocated for the dismissal of all the charges against Umphreyville.

On June 20, 2002, the Investigating Officer submitted his Report and Recommendations to the Commanding Officer. The Investigating Officer recommended the dismissal of the conspiracy charge, both specifications of rape, and four of the seven specifications under Article 134 of the UCMJ. However, the Investigating Officer found that sufficient evidence had been presented to permit the sodomy charge to proceed to court-martial, as well as the three remaining specifications under Article 134.

Cont.d 2: documents, and other evidence considered by the Article 32 Investigating Officer are available to the defense. Id.

3 Civilian witnesses cannot be compelled by the government or the accused to attend an Article 32 proceeding. See Schlueter, supra n.1, §7-2.

The Investigating Officer further determined that the evidence supported an additional charge for supplying alcohol to a minor, in violation of Article 134. The Investigating Officer recommended that the charge be referred to a summary court-martial.[4]

On July 16, 2002, after the Investigator's Report was issued, Gittins sent Umphreyville's father a memorandum analyzing the disposition options, the ranges of potential punishment, and the likelihood od a successful defense. Gittins recommended that Umphreyville enter "a plea of guilty at a summary court-martial to the charges [Gittins] believe[d] the Government [could] and [would] prove at trial- sodomy, solicitation, and indent language." (Def.'s Ex. K).

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4 The summary court-martial is one of three types of court-martial. It is "designed to dispose of minor offenses in a simplified proceeding," and "consists of one commissioned officer who may, but need not, be a lawyer." Schlueter, supra n. 1, § 1-8(D)(1). "The maximum permissible punishment that may be imposed by a summary court includes confinement at hard labor for one month, forfeiture of two-thirds pay for one month, hard labor without confinement for forty-five days, or restriction for two months." Id.

Rather than referring the remaining charges to a summary court-martial, as recommended by the Investigating Officer, the Commanding Officer ultimately offered to have the charges resolved at an Article 15 nonjudicial punishment ("NJP") proceeding and Umphreyville accepted the offer. 5

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5 Nonjudicial punishment is governed by Article 15 of the UCMJ, 10 U.S.C. §815. This disciplinary procedure "is designed to allow a commander to quickly impose minor punishments for minor offenses committed by members of hias command." Schlueter, supra n. 1,§1-8(C). "[A]lthough the imposition of punishment under Article 15 does not constitute a federal conviction, a variety of due process protections are provided for what is essentially a consent proceeding." Id. at § 3-1. There are four categories of punishment that may be imposed under Article 15: (1) reduction in grade; (2) deprivation of liberty; (3) deprivation of pay; and (4) censure. Id.at § 3-6(A). The commanding officer generally has wide discretion in determining whether to impose punishment and the amount of punishment. Id.at § 3-3. Unless a service member is embarked in or attached to a vessel, the service member may refuse to accept the nonjudicial punishment procedure and demand a trial by court-martial. Id.at § 3-4.

At Quindlen's direction, Umphreyville sent the Commanding Officer a letter on July 18, 2002, which indicated that Umphreyville strongly believed that he could prove his innocence, but that he "would be willing to face any punishment under Non-Judicial Punishment."6 (Def.'s Ex. P) (emphasis in original). Umphreyville further requested that he "be allowed to retain [his] MOS as a Military Police Officer and not be separated from the marine Corps." (Def.'s Ex. P.).

On August 20, 2002, Umphreyville signed a "free and voluntary" typewritten statement regarding the sodomy charge and the remaining specifications under Article 134. (Def.'s Ex. J). With respect to the sodomy charge, Umphreyville stated that he "allowed [Kayleen] A. Anderson, on the morning of 09Mar02, to perform oral sex on [him]," but that he "never asked for or expected it," (Def.'s Ex. J.). As for the Article 134 specifications of soliciting indecent acts and using indecent language, Umphreyville admitted that he asked Anderson on March 9, 2002 if she would also sleep with Lance Corporal Marek. Umphreyville emphasized, however, that he was merely joking with Anderson and he did not mean to imply that he was interested in group sex.

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6 Umphreyville testified at his deposition that Quindlen instructed him to write the letter to the Commanding Officer, and that he did not know whether Gittins was aware that the letter had been written. (Umphreyville Dep. At 115-117).

Umphreyville also acknowledged that the possibly of a "threesome" involving himself, Lance Corporal Marek, and Melissa Nortum was discussed in Nortum's presence, but that "in reality it was brought up more in [Nortum's] absence."(Def,'s Ex.J)

On August 26, 2002, Umphreyville signed and initialed several documents affirming his understanding of his rights with respect to the NJP process. Umphreyville also acknowledged that he did not have to agree to the process, and that by doing so, was waiving his rights to have the remaining charges adjudicated at a court martial proceeding.

Mary Fran Quindlen met with Umphreyville and discussed the NJP process with him. However, neither Quindlen nor Gittins represented Umphreyville at the NJP hearing. According to Quindlen, "Military detailed defense counsel are not permitted to attend or represent accused at NJP," and "it was [her] understanding that the Convening Authority disfavored attorneys serving as spokepersons at NJP proceedings." (Quindlen Aff. at para. 37).

Consequently, Quindlen believed that Umphreyville "would be disserved at the NJP if he attended with counsel."[7] (Quindlen Aff. at para. 37).

Umphreyville appeared before his Commanding Officer for the NJP hearing on September 6, 2002. For reasons that are disputed, the hearing was abruptly terminated and rescheduled for September 11, 2002.[8] Between September 6, 2002 and September 11, 2002, neither Umphreyville nor his father contacted Gittins to discuss the case or request Gittins' presence at the second NJP session.

At the completion of the NJP hearing on September 11, 2002, the Commanding Officer found that Umphreyville violated Article 125 of the UCMJ, which prohibits sodomy, by engaging in oral sex with Kayleen Anderson. The Commanding Officer also determined that Umphreyville violated Article 134 by using obscene and indecent language, as charged

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7 The court notes that there is no evidence that Gittins told Umphreyville that he could not be represented by counsel at the NJP proceeding, or that Umphreyville ever requested Gittins' representation in connection with that proceeding.

8 According to the defendant's evidence, the Commanding Officer asked Umphreyville to leave the first session because the Commanding Officer believed that Umphreyville was acting disrespectfully. However, Umphreyville alleges that the Commanding Officer was under the impression that Umphreyville was going to plead guilty to all of the remaining

in three specifications under that article. The Commanding Officer imposed the following punishment: a reduction in pay grade; forfeiture of pay for (2) months; and restrictions and extra duties for 30 days.

At some point following the NJP proceeding, Umphreyville was notified that his military occupation specialty designation of military policeman was being voided as a result of the NJP disposition. He subsequently attempted to appeal the NJP disposition by filing a request mast application with the Commanding Officer. However, Umphreyville later withdrew the application. Although Umphreyville has also attempted to have the NJP disposition removed from his service record by the Board for Correction of naval Records, he has been unsuccessful.

Umphreyville was honorably discharged from the Marine Corps in 2003, after completing his four-year enlistment. At the time of his voluntary release from active duty, Umphreyville had regained his occupational specialty of military policeman. However, he has since been turned down for at least two jobs in civilian law enforcement and/or security following the performance of a background check.

(8 Cont.d) charges and was caught off guard when Umphreyville proclaimed his innocence.

Umphreyville filed the instant action against Gittins on September 10, 2007, asserting claims for breach of contract (count I and II) and legal malpractice(counts III, IV, and V). in counts II, III, and IV, Umphreyville alleged that Gittins breached the parties' retainer agreement and committed legal malpractice by failing to adequately prepare for the Article 32 proceeding and by failing to adequately represent Umphreyville's interests during the Article 32 hearing. In counts I and V, Umphreyville alleged that Gittins breached the parties' retainer agreement and committed legal malpractice by failing to prepare Umphreyville for the NJP proceeding and by failing to appear at the NJP proceeding to advocate on Umphreyville's behalf. Umphreyville further alleged that, as a result of Gittins breach of contract and malpractice, Umphreyville "was injured in the amount of $1,210,090.00, including loss of pay grade toward advancement in the military, loss or damage to future military career, loss or damage to any career in law enforcement, and loss of the monies paid to the Defendant." (Compl. At 17,18,20,21,23).

The case is presently before the court on Gittins' motion for summary judgment. The court held a hearing on the motion on August 6, 2009. The motion is fully briefed and ripe for ruling.

Standard of Review

An award of summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment As a matter of law." Fed. R. Civ. P. 56(c). For a party's evidence to raise a genuine issue of material fact to avoid summary judgment, it must be "such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc.,477 U.S. 242,248 (1986). In determining whether to grant a motion for summary judgment, the court must view the record in the light most favorable to the non-moving party. Terry's Floor Fashions, Inc. v. Burlington Indus.,Inc., 763 F.2d 604, 610 (4th Cir. 1985).

A party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met that burden, however, the burden shifts to the nonmoving party to show that such an issue does, in fact, exist. See Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The nonmoving party must set forth more than a "mere...

scintilla of evidence" to forestall summary judgment. Anderson, 477 U.S. at 252. "Unsupported speculation is not sufficient." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987).

Discussion

I. Choice of Law

Because the court's subject matter jurisdiction is premised on diversity of citizenship, the court must first address which state's law govern Umphreyville's claim. In so doing, the court applies the choice-of-law rules of the forum state—in this case, Virginia. Hitachi Credit America Corp. v. Signet Bank, 166 F.3d 614, 623-624 (4th Cir. 1999) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

Under Virginia law, claims for legal malpractice and breach of contract by an attorney are one in the same; a claim for legal malpractice, although sounding in tort, is considered a claim for breach of contract. See, e.g., Cox v. Geary, 624 S.E.2d 16, 22 (Va. 2006) ("[A]n action for the negligence of an attorney in the performance of professional services, while sounding in tort, is an action for breach of contract. It is the contract formed between an attorney and a client that gives rise to the attorney-client relationship; but for the contract, the attorney owes no duty to the client.") (internal citation and quotation marks omitted). When claims are contractual in nature, "Virginia adheres to the

principle that the law of the place of performance governs questions arising in connection with the performance of [the] contract." Equitable Trust Co., v. Bratwursthaus Mgmt. Corp., 514 F2d 565, 567 (4th Cir. 1975).

In this case, it appears from the record that Gittins' legal services were to be performed in both Virginia, where Gittins maintained a law practice, and South Carolina, where Umphreyville was stationed. Consequently, the court will consider Gittins' summary judgment motion under Virginia law and South Carolina law. Nonetheless, the court notes that the relevant legal principals are fundamentally the same in both states.

II. The Article 32 Proceeding

In counts II, III, and IV, Umphreyville alleged that Gittins breached the parties' retainer agreement and committed legal malpractice by failing to adequately prepare for the Article 32 proceeding and by failing to adequately represent Umphreyville's interests during the Article 32 hearing. Under Virginia law and South Carolina law, a plaintiff who asserts a cause of action against an attorney for legal malpractice, regardless of whether the action is based in contract or in tort, ""must plead and prove that a relationship existed between them which gave rise to a duty, that the attorney neglected or breached the duty, and that the neglect or breach was a proximate cause of loss to the

plaintiff."Hendrix v. Daugherty, 457 S.E.2d 71, 74 (Va. 1995); see also Holy Loch Distrib., Inc., v. Hitchcock, 531 S.E.2d 282, 285 (S.C. 2000) ("To prevail in a legal malpractice claim, [based on negligence, breach of fiduciary duty, or breach of contract,] the plaintiff must satisfy the following four elements: (1) the existence of an attorney-client relationship; (2) breach of duty by the attorney; (3) damage to the client; and (4) proximate causation of client's damage by the breach.") Hewlette v. Hovis, 318 F. Supp. 2d 332, 335 (E.D. Va. 2004) ("[E]ven though the action is for breach of contract, tort principles, including the negligence standard of care ..., are applicable to a contract action for legal malpractice. ") (applying Virginia law).

In this case, it is undisputed that Gittins was retained to represent Umphreyville in connection with the Article 32 hearing, and thus, that the parties had an attorney-client relationship during that particular phase of the military justice proceedings, which gave rise to a duty on the part of Gittins. Nonetheless, the court concludes that Umphreyville has failed to proffer sufficient evidence to establish the requisite breach of duty, and thus, that Gittins is entitled to summary judgment on counts II, III, and IV.

As a general rule, in order to prove the second element of a claim for legal malpractice (breach of duty by the defendant), the plaintiff must establish,

by expert testimony, the specific duty of care owed to the plaintiff. See Geiserman v. MacDonald, 893 F.2d 787, 793 (5th Cir. 1990) (" In most legal malpractice cases, 'expert testimony is necessary to establish the standard of care since only an attorney can competently testify as to whether the defendant comported to the prevailing legal standard.'") (quoting R. Mallen & J. Smith, Legal Malpractice § 27.15, at 671-672 (1989). This is the case in both Virginia and South Carolina. See, e.g., Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corps., 457 S.E.2d 28, 33 (Va. 1995); Smith v. Haynsworth, 472 S.E.2d 612, 613 (S.C. 1996). Exceptions to the rule exist only in those "rare instances" where the acts in question "clearly lie [] within the range of the jury's common knowledge and experience." Beverly Enterprises-Virginia v. Nichols, 441 S.E.2d 1, 3 (Va. 1994); see also Southeaster Hous. Found. V. Smith, 670 S.E.2d 680, 694 (S.C. Ct. App. 2008).

Having reviewed the record, the court concluded that the claims asserted in counts II,III, and IV do not involve the type of rare circumstances in which expert testimony on the standard of care is not required, and that the expert testimony proffered by Umphreyville is insufficient to withstand summary judgment. Indeed, Umphreyville has not presented any expert testimony that identifies the appropriate standard of care owed by an attorney retained to represent a client during the course of an Article 32 proceeding or the way in which such standard was breached in this case. Robert Nunley,

Umphreyville's proposed standard of care expert, specifically limited the scope of his analysis to Gittins' performance during the period following the Article 32 proceeding; he expressed no opinion regarding whether Gittins' handling of the Article 32 proceeding comported with the applicable standard of care. The court agrees with Gittins that the absence of expert testimony is fatal to Umphreyville's claims that arose from Article 32 proceeding, and thus, that Gittins is entitled to summary judgment with the respect to count II, III, and IV. 9

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9 Alternatively, the court notes that there is also no evidence, expert or otherwise, that Gittins' performance during the course of the Article 32 proceedings was a proximate cause of Umphreyville's claimed damages. As will be discussed infra, "[a] mere allegation of negligence or breach of a duty is not sufficient to support an action for legal malpractice"; instead, " a plaintiff is required to plead [and prove] that he substained damages proximately caused by the attorney's acts and omissions." Hendrix,457 S.E.2d at 74-75. To establish proximate cause in a legal malpractice action, the plaintiff must plead and prove that the result in the underlying action would have been different but for the attorney's negligence or breach. Id. Here, Umphreyville has not presented any evidence from which a reasonable jury could find that, absent Gittins' alleged negligence or breach, the result of the Article 32 proceeding would have been different.

Additionally, the court notes that, to the extent Umphreyville seeks to recover the legal fees paid to Gittins in exchange for his representation at the Article 32 hearing, such fees are not recoverable, since they were not proximately caused by Gittins' alleged malpractice. See Rutter v. Jones,

III. The NJP Proceeding

In counts I and V of his complaint, Umphreyville alleged that Gittins breached the parties' contract and committed legal malpractice by failing to adequately prepare him for the NJP proceeding and by failing to appear at the NJP proceeding to advocate on his behalf. For the following reasons, the court concludes that Gittins is also entitled to summary judgment with respect to these counts. Specifically, the court concludes that no reasonable jury could find that the scope of the parties' attorney-client relationship extended to the NJP proceeding, and thus, that Gittins owed no duty with respect to that proceeding. Moreover, even if Gittins did owe a duty to Umphreyville and the duty was breached, Umphreyville has failed to offer any competent evidence from which a reasonable jury could find that the breach was the proximate cause of his claimed damages.

(9 cont'd.) Blechman, Woltz & Kelly P.C., 568 S.E.2d 693, 694 (Va. 2002) (holding that the legal fee paid to the defendant was not recoverable in a legal malpractice action, since the fee was "merely the agreed-upon cost of the service, the consideration given for the contract, and not the damage or injury arising from the breach of contract").

A. The Attorney-Client Relationship

When an attorney's alleged negligence or breach of contract involves a failure to act, there can be no negligence or breach absent a duty to act. Macawber Engineering, Inc. v. Robson & Miller, 47 F.3d 253, 25 (8th Cir. 1995). "An attorney's duty to act arises from the attorney-client relationship," and the extent of the attorney's duty necessarily depends on the scope of the relationship. Id. Thus, proof of an attorney-client relationship is essential to establishing a claim for legal malpractice. See, e.g.,Cartensen v. Christland Corp., 442 S.E.2d 660, 668 (Va. 1994); American Fed. Bank, FSB v. Number One Main Joint Venture, 467 S.E.2d 439, 442 (S.C. 1996). Whether an agreement employing an attorney to handle a particular matter is express or implied, there must be "some indication that the advice and insistence of the attorney was sought and received." Carstensen, 442 S.E.2d at 668; see also DeVaux v. American Home Ins. Co., 444 N.E.2d 355, 357 (Mass. 1983) (holding that "[t]he agreement or consent of an attorney to represent a prospective client in a particular matter does not create an attorney-client relationship as to other affairs of the client").

In the instant action, as previously stated, it is undisputed that an attorney-client relationship was established in May 2002, when Umphreyville's father retained Gittins to represent Umphreyville. The record reveals, however, that the scope of the

parties' attorney-client relationship was limited. Gittins' retainer letter to Umphreyville's father, which purported to "set[] forth completely the terms of [the representation] agreement," expressly provided that Gittins would represent Umphreyville at the Article 32 hearing for a flat fee of $5000 "payable...at the time [Gittins was] retained to represent [Umphreyville]." (Compl. Ex. A). The letter further provided that Gittins would represent Umphreyville during the course of any subsequent court-martial proceedings for a flat fee of $9000, but that "[t]his portion of the fee [would] be due only if the charges [were] referred to trial." (Compl. Ex. A). Here, of course, none of Umphreyville's charges were referred to trial by court-martial. Instead, the most serious charges were dismissed following the Article 32 hearing, at which Umphreyville was represented by Gittins, and the remaining charges were disposed of by Umphreyville's Commanding Officer at an administrative NJP proceeding. The NJP proceeding was neither part and parcel of the Article 32 proceeding for which Gittins was retained to provide representation, nor a trial by court martial. Consequently, the court concludes that the retainer letter provides no basis upon which a reasonable jury could find that the NJP proceeding fell within scope of the parties' attorney-client relationship.

In addition, there is no evidence that Umphreyville or his father ever requested Gittins' representation at the NJP proceeding, or that Gittins

ever expressly or implicitly agreed to provide such representation. To the contrary, Umphreyville admitted at his deposition that he "[n]ever specifically ask[ed] Mr. Gittins to come into town and deal with the NJP," and that he never contacted Gittins to request his assistance at the rescheduled NJP hearing after the Commanding Officer abruptly ended the first session. [10] (Umphreyville Dep. Tr. At 120-121). Likewise, Umphreyville's father testified that he last talked to Gittins on July 16, 2002, that he did not rely on Gittins to do anything after that date, and that neither he nor his son contacted Gittins to request Gittins' representation at the NJP proceeding. (Eric Umphreyville Dep. Tr. At 95-104). While both Umphreyville and his father emphasized during their depositions that Mary Fran Quindlen

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10 The court notes that Gittins testified at his deposition that he recalled having a phone conversation with quindlen and Umphreyville at some point following the Article 32 proceeding, during which Quindlen "passed on what she knew about what the command was proposing to do" i.e., "that they were going to take [Umphreyville] to NJP" on the remaining charges. (Gittins Dep. Tr. At 44-45). While Gittins testified that he subsequently suggested, during the same conversation, that Umphreyville "remain silent, keep [his] mouth shut, take [his] punishment, and leave" (Gittins Dep. Tr. At 45), there is no evidence that Umphreyville or his father requested Gittins' representation in connection with the NJP proceeding, and the court is convinced that no representation agreement can implied from the limited discussion described by Gittins.

advised them that Umphreyville could not be represented by an attorney at the NJP hearing, there is no evidence that Umphreyville or his father requested Gittins' advice on this issue or any other issue related to the NJP process.

In response to Gittins' motion for summary judgment, Umphreyville cites to the affidavit from his proposed expert, Robert Nunley, in which Nunley stated, in a conclusory fashion, that Gittins owed a "continuing obligation" to Umphreyville during the course of the NJP proceeding. (Nunley Aff. at 1). Given the absence of any factual basis for Nunley's statement, the court is convinced that Nunley's affidavit fails to create a genuine issue of material fact on this issue. See Macawber Engineering, Inc., 47 F.3d at 257 (emphasizing that the affidavit of Macawber's expert merely assumed that the attorneys had a duty to act and that "[a]n expert cannot create a duty...where no underlying duty exists").

In sum, the court concludes that while an attorney-client relationship undisputedly existed between Gittins and Umphrreyville during the course of the Article 32 proceeding, no reasonable jury could find that the scope of that relationship extended to the NJP proceeding. Accordingly, Gittins owed no duty to Umphreyville during the course of that proceeding.

B. Proximate Cause

The court also concludes that even if an attorney-client relationship existed between Umphreyville and Gittins at the time of the NJP proceeding, which gave rise to a duty of care, and even if the duty was breached, Gittins is nonetheless entitled to summary judgment. It is well-established that proof of negligence or breach of contract, alone, is insufficient to prevail in a legal malpractice action. Hendrix, 457 S.E.2d at 74-75. The plaintiff must also prove that the attorney's negligence or breach of duty proximately caused the damages claimed. Id.; see also Campbell v. Bettius, 421 S.E.2d 433, 436 (Va. 1992); Hall v. Fedor, 561 S.E. 654, 656 (S.C. Ct. App. 2002). This Umphreyville has failed to do.

Under Virginia law and South Carolina law, in order to establish proximate cause in a legal malpractice action, the plaintiff must present sufficient evidence from which a reasonable jury could find that, but for the alleged malpractice, the result would have been different in the underlying action. See Williams v. Joynes, 677 S.E.2d 261, 264 (Va. 2009); Doe v. Howe, 626 S.E.2d 25, 30 (S.C. Ct. App. 2005). This is true regardless of whether the legal malpractice action is brought in contract or in tort. See, e.g., Brown v. Slenker, 220 F.3d 411, 426 (5th Cir. 2000) (holding that the "same showing of proximate cause" was required with regard to the plaintiff's claim that the attorney breached the

parties' contract by "failing entirely to represent the [plaintiff]," as was required with regard to the plaintiff's claim for legal malpractice) (applying Virginia law); see also Hendrix, 457 S.E.2d at 73-74 (affirming a demurrer to a legal malpractice action alleging negligence and breach of contract, since the plaintiffs "failed to allege that they would have prevailed in the underlying action but for the negligence of the defendant attorneys").

In response to Gittins' motion for summary judgment, Umphreyville argues that his claimed "harm and damages...would not have occurred if all [of the] charges had been dismissed." (Pl.'s Resp. at 9). However, Umphreyville has not proffered any evidence from which a reasonable jury could find that his charges would have been dismissed at the NJP hearing, or that he would have otherwise obtained a more favorable outcome, but for Gittins' alleged negligence or breach of contract.

Although Umphreyville's proposed expert witness, Robert Nunley, opined in his 2008 affidavit that Umphreyville suffered "adverse consequences and injuries to a then-promising Marine Corps career and his future job and earning prospects" as a result of the NJP hearing (Nunley Aff. at 2), Nunley was unable to testify at his subsequent deposition that, in the absence of Gittins' alleged malpractice, Umphreyville would have obtained a more favorable result. Indeed, when Nunley was asked if he had

"any opinions as to whether the result [of the NJP] would have been different" if Umphreyville had "proceeded to the NJP with counsel and pled not guilty and had counsel state his position and present witnesses," Nunley testified that he "[could]n't say one way or the other." (Nunley Dep. At 120). Likewise, Nunley "[could]n't say" whether Umphreyville would have fared better if he had refused to participate in the NJP process and instead demanded a trial by court-martial. (Nunley Dep. At 122). To the contrary, Nunley specifically acknowledge that there was "a possibility...that [Umphreyville] could have had a conviction" if he had proceeded to a court-martial proceeding, which would have given rise to more serious consequences than Umphreyville faced by electing to have the charges disposed of by his Commanding Officer at a NJP proceeding.[11] (Nunley Dep. At 122).

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11 The court notes that Umphreyville has repeatedly admitted that he allowed 17-year-old Kayleen Anderson to perform oral sex on him, and that the record reveals that it was that sexual act which gave rise to the sodomy charge. During Robert Nunley's deposition, Nunley acknowledged that "what's not sodomy" in the "outside civilian world...could very well be sodomy in the military." (Nunley Dep. At 118).

Umphreyville's only other evidence in this regard is an affidavit from Richard Van Bortel, a retired Marine First Sergeant who was present when Umphreyville appeared before the Commanding Officer for the NJP hearing. In the affidavit, Van Bortel stated that Umphreyville "made every effort to prove his innocence," but that "Umphreyville's plea of 'not guilty' was rejected." (Van Bortel Aff. at 1). Van Bortel further averred that "there may well have been a different result" if "Umphreyville had been represented by a competent attorney." (Van Bortel Aff. at 2). However, Van Bortel did not set forth any factual basis or reasoning for his lay opinion, and the affidavit provides no indication that Van Bortel "is competent to testify on the matter[] stated." Fed. R. Civ. P. 56(e). It is well-established that "[s]uch conclusory affidavits are insufficient to

survive a motion for summary judgment."[12] Cottom v. Town of Seven Devils, 30 F. App'x 230, 235 (4th Cir. 2002); see also Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 962 (4th Cir. 1996) ("Summary judgment affidavits cannot be conclusory.").

Based on the foregoing, the court concludes that Umphreyville has failed to come forward with

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12 The court also notes that Van Bortel's affidavit provides no indication that he was aware of Umphreyville's August 20, 2002 typewritten statement, in which Umphreyville admitted to (1) engaging in oral sex with Anderson; (2) jokingly asking her to sleep with Lance Corporal Marek; and (3) discussing the possibility of a threesome involving himself, Marek, and Melissa Nortum in Nortum's presence. The United States Court of Appeals for the Fourth Circuit has held that a witness's lay opinion is insufficient to warrant denial of summary judgment when the witness is unaware of facts that are relevant to the issue on which the witness's opinion is offered. Waterman v. Batton, 393 F.3d 471, 479 n.8 (4th Cir. 2005) ("Even ignoring the conclusory nature of the lay opinions do not create a genuine issue of fact because the witnesses were unaware of the fact most critical to the probable cause analysis.")

Sufficient evidence, expert or otherwise, that would permit a reasonable jury to find that Umphreyville's claimed damages were proximately caused by Gittins' alleged negligence or breach of contract. Consequently, on this alternative ground as well, Gittins is entitled to summary judgment on counts I and V.

Conclusion

For the reasons stated, the court will grant the defendant's motion for summary judgment. The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to the plaintiff and all counsel of record.

ENTER: This 29th day of September, 2009.

"s/". Glen Conrad
United States District Judge

Appendix C

No. 09-2241 (5:07-cv-00096-gec-bwc)
Order - denying petition for rehearing and rehearing en banc – March 30, 2010.

FILED: March 30, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2241
(5:07-cv-00096-gec-bwc)

KEVIN C. UMPHREYVILLE,

Plaintiff – Appellant

v.

CHARLES W. GITTINS,

Defendant – Appellee

O R D E R

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge King and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix D

No. 09-2241 Stay of Mandate March 8, 2010.

Filed: March 8, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STAY OF MANDATE UNDER
FED. R. APP. P. 41 (d) (1)

No. 09-2241, Kevin Umphreyville v. Charles Gittins
5:07-cv-00096-gec-bwc

Notice is provided to the Clerk of the District Court that:

[X] This Court's mandate has been stayed pending disposition of a petition for panel and/or en banc rehearing.

[ ] This Court's mandate has been stayed pending disposition of a motion to stay the mandate.

[ ] This Court's mandate has been recalled for the limited purpose of considering a timely petition for panel and/or en banc hearing.

/s/ PATRICIA S. CONNOR, CLERK

Appendix E

No. 09-2241 Mandate April 7, 2010.

FILED: April 7, 2010

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 09 – 2241

(5:07-cv-00096-gec-bwc)

KEVIN C. UMPHREYVILLE,

Plaintiff - Appellant

v.

CHARLES W. GITTINS,

Defendant – Appellee

M A N D A T E

The judgment of this Court, entered February 22, 2010, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41 (a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk